NO. 92-1862

FILED
MAY 20 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1992

B. C., JR.
Petitioner

v.

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state that accepts funds under the Individuals With Disabilities Education Act ("IDEA") may implement a statutory scheme that allows a juvenile court, in a Child in Need of Supervision proceeding, to abrogate an emotionally disturbed child's right under IDEA to receive a free appropriate public education, by unilaterally dictating, as a condition of probation, that the child's educational placement be restricted to homebound instruction for the next four years.

LIST OF PARTIES

Petitioner is B. C., Jr., a minor child, who was the defendant in the juvenile court proceedings at issue herein and the appellant in the Louisiana Court of Appeal for the Third Circuit. Respondent is the State of Louisiana, through Edward Tarpley, Jr., the District Attorney for the Parish of Grant, Louisiana and Richard Ieyoub, the Attorney General for the State of Louisiana.

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PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner B.C., Jr.[1] a student with disabilities as defined by federal law, requests that a writ of certiorari issue to review the judgment and opinion of the Louisiana Court of Appeal, Third Circuit, entered on December 9, 1992, which upheld the authority of the Juvenile Court for the Parish of Grant to severely restrict

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[1] To maintain confidentiality, petitioner is referred to herein by his initials, as was done in the state court public documents.

the education of Petitioner, and thereby effectively abrogate his rights under the Individuals with Disabilities Education Act.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the Third Circuit, reprinted in the Appendix beginning at page A-1, is officially reported at 610 So. 2d 204 (La.App. 3rd Cir. 1992). The judgments of the Juvenile Court for the Parish of Grant, Lousiana, reprinted in the Appendix beginning at pages A-18 and A-21, are unreported.

STATEMENT OF JURISDICTION

1. The Judgment of the Louisiana Court of Appeal for the Third Circuit was rendered on December 9, 1992. Petitioner's application to the Louisiana Supreme Court for writs of certiorari and review of the Court of Appeal decision was

filed on January 6, 1993 and was denied on February 19, 1993. (Appendix, page A-22).A motion for reconsideration of a denial of writs is not permitted. Supreme Court of Louisiana Rule IX, Section 6. Appendix, page A-23. Therefore, the decision of the Court of Appeal is final. This petition for writ of certiorari is being filed within ninety days of that final judgment.

2. The federal questions were raised in the proceedings below as indicated at pages 8-10, 13-14 *infra*.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257 (a).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Individuals with Disabilities Education Act, (IDEA): 20 U.S.C. §1400; §1401 (a)(1),(6),(7),(16),(18),and (20); §1412;

and §1415; and its implementing regulations, 20 CFR Part 300: § 300.7 (a)(1),(b)(9); §300.305, §300.343, §300.344, §300,533, §300.551, and §300.552, are set forth in the Appendix beginning at pages A-24 and A-52, respectively. Pertinent Louisiana special education regulations, Bulletins 1706, § 449 and Bulletin 1508,page 41 "Behavior Disorder", are set forth in the Appendix beginning at pages A-62.and A-65, respectively.

STATEMENT OF THE CASE

B.C., Jr., a student, now fourteen years old, enrolled in Grant Parish public schools, has been classifed since 1986 as having the disablity of behavior disorder[2] and has received special

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[2] Louisiana's Bulletin 1508 definition of behavior disorder, which is comparable to the IDEA definition of "seriously emotionally disturbed", 34 C.F.R.§300.7(b)(9), is included in the Appendix beginning at page A-65.

education services to address this disability.

According to his educational multi-disciplinary evaluation, B.C.'s disability causes him to exhibit behaviors such as verbal abusiveness towards teachers and other adults, physical aggression toward classmates, defiance toward adult authority figures, and a tendency to deny the blame for his wrongdoing. B.C. has also been diagnosed as having an oppositional defiant disorder and conduct disorder, as well as a mild, chronic depression , related to his inability to resolve his grieving over the death of his father.

Until September of 1991, B.C. received special education services to address his behavior disorder as part of a full day program in a regular junior high school environment. Despite his

disabilities, B.C. was performing well academically and making progress toward his high school diploma under this program.

In September, 1991, when he was twelve years old, B.C., who is black, was suspended from school for pushing a white female student. On September 18, 1991, after a complaint was lodged by the girl's father, a petition was filed by the District Attorney in the Grant Parish Juvenile Court asking that B.C. be declared a "Child In Need of Supervision" (CINS) under the Louisiana Children's Code[3] because of this and other incidents involving B.C.'s behavior at school. At an October 2, 1991 adjudication hearing,

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[3] Defined, in relevant part, as a child who "is habitually truant from school or willfully violates the rules of the school". La.Children's Code Art. 791.1(1) (eff. Jan 1, 1992); formerly La.Code of Juvenile Pro. Art.13. Note: Effective July 1, 1993, there will be more CINS proceedings in Louisiana juvenile courts, but rather "Families in Need of Services" proceedings. La.Children's Code Art. 791.

B.C. pled guilty to being a CINS and the Juvenile Court ordered that homebound instruction be provided to him by "the appropriate educational authority." Appendix at page A-21. Homebound instruction refers to the provision of educational services, for a few hours a week, at a student's home. Louisiana's special education regulations permit the provision of homebound instruction in only a very few, very specific circumstances.[4] , none of which apply to B.C.

On October 11, 1991, the Grant Parish special education department held an Individualized Education Program (IEP) meeting to discuss B.C.'s educational program, as is required by state and federal law whenever a special education student is disciplined. At that meeting,

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[4] Bulletin 1706,§ 449. Appendix pages A-62 - 65.

the committee determined that the behavior for which B.C. was punished (the pushing of the female student) was related to his disability. It further determined that B.C. could return to school, with the school system providing him with an aide who would provide one-on-one supervision to assist him in controlling his aggressiveness and to provide immediate controls over any inappropriate behavior. A similar plan had proven successful in enabling B.C.to complete the 1990-91 school year with passing grades. However, according to the testimony of the Special Education Supervisor, the IEP has never been implemented due to the Juvenile Court order of homebound instruction.

On October 22, 1991, Petitioner's counsel filed a motion to revoke the order of homebound placement, alleging

that the Juvenile Court lacked jurisdiction over the educational placement of the child because of his rights under the IDEA, or, in the alternative, that the Juvenile Court should defer to the opinion of education professionals. Appendix, pages A-67 - A-72. At a hearing on November 14, 1991, Ms. Ollie Goudeau, the Supervisor of Special Education for Grant Parish, testified regarding special education law and procedures, and the professional conclusions of the IEP committee.

Counsel for both sides subsequently submitted memoranda on the issues presented, including the federal question of the effect of the IDEA on orders of a Juvenile Court. Petitioner's counsel also submitted, as additional evidence, the child's most recent multi-disciplinary evaluation, along with a

motion seeking a ruling on the federal issue of the Juvenile Court's authority to make educational decisions abrogating the Petitioner's IDEA rights. Appendix, pages A-73 - A-77.

The record before the Juvenile Court contained the invesigating police detective's notes, statements, and reports compiled when the original complaints against B.C. were being investigated, which were included in the record at the time the child pled guilty. Also included were the pre-dispositional report, including an evaluation by psychologist Ronald S. Pryer, Ph.D.; the testimony of the parish Supervisor of Special Education; the IEP developed and agreed to by the child, his parent, the special education supervisor, and the teacher and principal who had provided statements to the investigator; and a

twenty-three page multi-disciplinary special education re-evaluation of the child prepared by two social workers, an assessment teacher, two psychiatrists, and a psychologist.

In the child's re-evaluation this multi-disciplinary team of qualified persons, who had conducted a thorough review of the child's special education needs, concluded that he should be served in a highly structured class at school. Dr. Ware, a consultative psychiatrist, specifically recommended that the child be seen by a male counselor, preferably in the school setting. He recommended that he be allowed to re-enter school as soon as possible on a trial basis, and further stated that the child would benefit from returning to school with an opportunity to play basketball and be

under the tutorship of the basketball coach.

In the psychological evaluation attached to the pre-dispositional report furnished to the court in October, 1992, it was recommended that the child continue in counseling and be considered for possible medication if he is to remain in the public school system, but there was no recommendation that he not do so.

Despite this clear evidence of the educational and psychological needs of this disabled child, and the recommendations of knowledgeable persons based on evaluation data, the probation officer recommended continued homebound services. However, he gave no reasons and provided no evidence in support of this recommendation.

At a June 3, 1992 hearing, the Juvenile Court indicated it did not wish to hear further evidence, then consulted with the probation officer and rendered a judgment of disposition which included, as a special condition of probation, "continued home bound instructions as provided by the Grant Parish Board of Education." Probation is to continue until October 20, 1995, B.C.'s eighteenth birthday. Appendix, pages A-18 - A-20. No written or oral reasons for judgment were given.

Petitioner timely appealed this judgment of disposition to the Louisiana Court of Appeal for the Third Circuit, where he again raised and argued questions of federal law. On December 9, 1992, the Court of Appeal affirmed the Juvenile Court's order of homebound educational instruction as a condition of

probation. Appendix, pages A-1 - A-17. The court concluded that "the IDEA only applies to a school system's authority to expel or place handicapped students; it does not limit the authority of juvenile courts", pages A-8 - A-9, and that "the IDEA does not apply to a juvenile court judgment ordering a juvenile to be educated in a residential setting". Page A-10.

Petitioner timely sought a review of the Court of Appeal judgment by the Supreme Court of Louisiana, again raising the federal questions,Table of Contents to Application for Writ of Certiorari, Appendix, pages A-78 - A-81, but the application for certiorari was denied on February 19, 1993. Appendix, page A-22. This Petition seeks review of that final judgment.

REASONS FOR GRANTING THE WRIT

This case raises the issue of the relationship between detailed federal and state laws regarding education services to students with disabilities, and the powers of juvenile courts in proceedings involving such students. Petitioner contends that a state which accepts funds under IDEA may not implement a statutory scheme which permits its juvenile courts to ignore or override the substantive rights and procedural safeguards required by the IDEA.

I. The Louisiana court has decided an important, unsettled question of federal law which should be resolved by this Court.

The Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.*, provides states with funds to assist in providing appropriate educational services to students with

disabilities, contingent upon State compliance with the substantive and procedural requirements of the Act. *Honig v. Doe*, 484 U.S. 305, 309-10 (1988). In participating states like Louisiana, IDEA confers upon students with disabilities an enforceable, substantive right to a free appropriate public education comprised of special education and necessary related services. *Id.* This includes the right to have decisions regarding the nature, scope and contents of educational services determined by a team of qualified professionals based upon knowledge of the child, evaluation data concerning the child, the child's disability, and available placement and service options. *See* 20 U.S.C. §1401(a)(18),(20);34 C.F.R. §§300.343, 300.344, 300.533 (1992); *c.f. Board of Education of the Hendrick Hudson*

Central School District v. Rowley, 458 U.S. 176, 208 (1982) ("[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child").

IDEA makes no exception for students whose disabilities manifest themselves through difficult behaviors, *Honig, supra*, 484 U.S. at 323, and no exception for students against whom Child In Need of Supervision or other juvenile proceedings have been brought. On the contrary, the Act demands that Louisiana provide a free appropriate public education to **all** children with disabilities within its jurisdiction, regardless of the severity

of their disabilities. 20 U.S.C. §1412(2)(C). The Louisiana Court of Appeal, however, has made just such an exception, and deemed it consistent with federal law. Its decision holds not only that Louisiana's juvenile justice statutes authorize the juvenile court to unilaterally limit Petitioner's educational program to homebound instruction for four years, but that IDEA places no limits on Louisiana's discretion to grant its courts such power.

The Louisiana Court of Appeal has thus decided that once petitioner was adjudicated to be a Child in Need of Supervision--a status offense--the State of Louisiana was free to strip him of federal rights otherwise guaranteed by IDEA. This critical, dangerous and

incorrect interpretation of federal law demands immediate correction.[5]

A. As a state accepting federal monies under IDEA, Louisiana must comply with the Act's mandates.

Part B of IDEA, 20 U.S.C. §1400 *et seq.*, as enacted in 1975, was intended to insure through grants of federal financial assistance and detailed assurances and conditions, that states provide all school-aged children with disabilities individualized education

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[5]Through this petition, Petitioner, who acceded to adjudication as a Child in Need of Supervision, contests only the manner in which the juvenile court exercised its dispositional authority. Petitioner contends that while in an appropriate case a juvenile court may make dispositional orders that affect the location of a child's educational placement, *e.g.*,by placing a child in a residential facility, in foster care, or in the custody of a State agency in turn authorized to make such a placement, the court may not dictate the nature and scope of the special education and related services the child may, or in the petitioner's case, may not, receive. Those determinations must be made by a team of qualified individuals acting in accord with IDEA's substantive and procedural requirements, convened by the public agency responsible for providing educational services in light of the particular disposition. See discussion *infra* at pp.24-32.

appropriate to their unique special needs.[6] Based on the record before it, Congress explicitly conditioned receipt of federal monies under IDEA upon the commitment of each participating state to provide each child with disabilities within its jurisdiction a free appropriate public education in accordance with the terms of the Act. 20 U.S.C. § 1412(1). The IDEA contains an unequivocal directive to states to provide a full, free and appropriate public education for all children with disabilities, regardless of the severity

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[6] While Congress' authority to enact this grant-in-aid program flows partially from its Spending Clause powers, *Board of Education v. Rowley, supra*, 458 U.S. at 190, n.11, 204,n.26, the IDEA is also an exercise of Fourteenth Amendment powers designed to effectuate the Equal Protection clause. *Smith v. Robinson*, 486 U.S. 992, 1010 (1984). Moreover, Congress expressly stated in the preamble of the IDEA: "[I]t is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of [children with disabilities] in order **to assure equal protection of the law**." 20 U.S.C. §1400(b)(9) (emphasis added).

of their disability. 20 U.S.C. §1412(2)(C).[7]

A state[8] seeking to qualify for assistance must be able to demonstrate, *inter alia*, (a) that it has affirmatively established detailed policies and procedures to provide free appropriate public education for all children with disabilities, and a comprehensive plan for insuring that all handicapped children are identified, located, and evaluated, 20 U.S.C. §1412(2)(B),(C); (b) that each identified child with disabilities receives an "individualized education program" which is prepared with parental input, annually reviewed and

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[7] The term "children with disabilities" is defined under IDEA to include children whose disabilities are characterized in part by behavioral difficulties. 20 U.S.C.§ 1401(a)(1)(A)(i). See also 34 C.F.R. §300.7(b)(5), "mentally retarded"; 34 C.F.R.§300.7(b)(9) "seriously emotionally disturbed", and Louisiana Bulletin 1508, p.41 "behavior disorder."

[8] 20 U.S.C.§ 1401 (6).

revised as necessary so as to meet his/her unique needs 20 U.S.C. §§1412(4), 1414(a)(5); (c) that the state education agency, as the single agency responsible for enforcement and compliance, has detailed procedural safeguards to insure that "to the maximum extent appropriate children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled...." 20 U.S.C. §1412(5)(B); and (d) that the state has standards to "assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education...." 20 U.S.C. §§1412(5)(A), 1415.

Under the Act, an appropriate education consists of special education

and related services meeting State educational standards, provided at public expense, under public supervision, and in conformity with an individualized education program (IEP). 20 U.S.C.§ 1401(18); 34 C.F.R. §300.8(d). Under Louisiana law, "homebound instruction" is limited to situations where a child has a serious physical or emotional illness and is undergoing a treatment regimen which does not permit education in a school setting. For emotional illnesses, the treatment must specify a specific date for return of the child to a school setting.[9] Thus, the juvenile court's disposition here where the Petitioner did not meet the criteria for consideration for "homebound instruction" -- the most restrictive setting available under

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[9] Louisiana Bulletin 1706, § 449.

Louisiana regulations[10] -- violated Louisiana's own State education agency standards. Where state education standards are higher, they must be incorporated into IDEA. *School Committee of the Town of Burlington v. Department of Education,* 736 F.2d 773, 789 (1st Cir. 1984),*aff'd on other grounds,* 471 U.S.359 (1985).

The IEP as defined by 20 U.S.C. §1401(20) is developed by a team of qualified persons[11], based on evaluation data relevant to the child's needs[12] and with significant input from the child's parents or guardian. As the written document "specially designed to meet the unique needs" of a child with a disability, the IEP is considered the "primary vehicle" for implementing the

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[10] Louisiana Bulletin 1706, § 448.
[11] 34 C.F.R. §§ 300.343 -300.344.
[12] 20 U.S.C.§1412(C); 34 C.F.R. §300.532(d),(e), (f); §300 533(a)(1)(2).

Congressional goals of IDEA, and the "centerpiece of the statute's education delivery system for disabled children." *Honig, supra*, 484 U.S. at 311. The statutory requirements governing the content of an IEP demonstrates the careful, detailed, comprehensive planning entailed in determining the nature and scope of education for children with disabilities. Such document must be reviewed annually and, if appropriate, revised to meet the child's education related needs.[13] Problems caused by disruptive or inappropriate behavior can and were intended to be addressed in the IEP process. Children with disabilities have a right to participate in the full variety of educational programs and services which are available to non-disabled students in the school system,

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[13]20 U.S.C. §1414(a)(5); 34 C.F.R. § 300.343(d).

including, *e.g.*, art, music, industrial arts, consumer homemaking and vocational education, physical education, and extracurricular activities.[14] Here, without any consideration of Petitioner's educational needs, and despite the specific recommendations of the consultative psychiatrist, the juvenile court through its limiting disposition precluded this child with a behavior disorder from participation in the full curriculum of the school program.[15]

After an instructional program has been individualized for a child, the members of the child's IEP team must, based on the IEP, select a placement capable of providing the services and meeting the goals identified in the IEP. Section 1412(5)(B) of IDEA creates a

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[14] 34 C.F.R. § 300.305.

[15] B.C. continues to be denied full educational opportunity and currently receives no related services.

legal presumption in the right of all students with disabilities to be educated to the maximum extent appropriate in the regular education classroom with their non-disabled peers. Specifically, the statutory provision requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, **or other removal of children with disabilities from the regular education environment** occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (Emphasis added).

Each participating state and school district must have "a continuum of alternate placements available to meet the needs of" students with disabilities.[16] The continuum must include instruction in regular class as well as instruction in hospitals and institutions[17]; it must also provide for supplementary services, such as resource room, aides, or itinerant instruction to be offered in conjunction with regular class placement.[18] Furthermore, unless a child's IEP calls for an alternative placement, a school system is required "to the maximum extent appropriate" to place a student with disabilities in the regular class setting, and unless inconsistent with the student's IEP, in the same school he would attend if he

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[16] 34 C.F.R. § 300.551(a).
[17] 34 C.F.R. § 300.551(b)(1).
[18] 34 C.F.R.§ 300.551(b)(2).

were not disabled.[19] Finally, in choosing the "least restrictive environment" consistent with the requirements of IDEA, the IEP team is required to consider "any potential harmful effect on the child and the quality of services which he or she needs."[20]

In the instant case the Petitioner's IEP team, which convened prior to the disposition by the juvenile court, reviewed his evaluations and school history, and properly recognized that the in-school conduct for which he was being adjudicated was related to his behavioral-emotional disorder and that they were responsible for providing him with an appropriate program to address his individual educational and behavioral needs. Accordingly, the members of B.C.'s IEP committee developed an

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[19] 34 C.F.R. § 300.552(c)
[20] 34 C.F.R. § 300.552 (d)

individualized education program calling for his placement in the public school, under close supervision of an aide.

Moreover, school personnel testified at B.C.'s juvenile court proceeding concerning the proposed IEP and the school's ability to implement it effectively. Recognizing that homebound instruction is the most restrictive placement on the continuum of alternatives available to the district[21], and that such placement was not only inappropriate for meeting the needs of a thirteen year old child with emotional-behavioral disorders but, unlawful[22] as well, the IEP committee recommended that Petitioner continue to be educated in the local school.

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[21] Louisiana Bulletin 1706, § 448.

[22] Petitioner did not qualify for "homebound instruction" based on the criteria established by the State in §449 of Bulletin 1706.

This Court recognized in *Board of Education v. Rowley, supra*, that strict adherence to the Act's procedural requirements set forth in 20 U.S.C. §1415 plus parental participation in the development of state plans, policies, and, particularly in the development and subsequent review of the child's IEP as well as any assessment of its effectiveness,[23] is critical to insure that children with disabilities receive all of the benefits to which they are entitled by the Act. 458 U.S. at 205-206, 208-209. The Act contains various procedural safeguards that guarantee parents an opportunity for meaningful input into all decisions affecting their child's education as well the right to seek review of any decisions with which they disagree via an impartial

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[23] 20 U.S.C. §§ 1400 (c), 1401(20), 1412(7), 1415(b)(1)(A),(C),(D),(E), and 1415(b)(2).

administrative hearing, and, if aggrieved by the hearing decision, a right to judicial review in any federal or state court of competent jurisdiction. 20 U.S.C.§1415 (b)(1).,(2),(c); 20 U.S.C. §1415(e)(2).

Responsibility for changing a disabled child's education placement rests with the members of the child's IEP team, which includes the child's parent(s), after consideration of the child's needs, evaluation data[24], current program and placement, and placement options. *S-1 v. Turlington*, 635 F.2d 342,347 (5th Cir. 1981), *cert denied* 454 U.S. 1030 (1981), *citing* 34 C.F.R. § 300.533(a)(3), § 300.345.

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[24] Under Louisiana regulations, a child may not be placed in a more restrictive environment unless a re-evaluation, supporting such a placement, has been completed.Louisiana Bulletin 1706 § 458B.

In short, as a child with disabilities, Petitioner is entitled under IDEA to receive a full and appropriate public education in a setting in which he is integrated to the maximum extent appropriate with non-disabled students. All education related decisions must made by a properly convened team knowledgeable about evaluation data relevant to his disabilities, his educational needs, and effective strategies and methodologies for addressing his behavioral management needs through his IEP. The juvenile court's order has deprived Petitioner of these protections for four years.

As discussed below, the legislative history of IDEA demonstrates that children such as B.C. are in fact the very children intended to be protected by Congress, if not from the wanton neglect

of society, from the unlawful exclusions by public schools, and increasingly, from the nefarious abuse of the judicial process. For a juvenile court to be permitted to sidestep the due process requirements of IDEA and violate the rights guaranteed by it would nullify the clear intent of Congress.

B.Protection of emotionally disturbed students like Petitioner from exclusion from school and educational neglect was a key impetus for passage of IDEA

Congress enacted the Individuals with Disabilities Education Act (formerly, the Education of All Handicapped Children Act), 20 U.S.C. §1400 *et seq.*, in 1975, in response to evidence of mistreatment and abuse, including that "for years [disabled] children of this country have been kept in the dark, deprived of a full, free public education." 121 Cong. Rec. H

37027 (daily ed., Nov. 18, 1975) (remarks of Rep. Gude). Passage of the Act was the culmination of legislative attempts by Congress begun in 1966, to address the national failure to provide children with disabilities "educational opportunity that has been long considered the right of every other American child" 121 Cong. Rec. S 20427 (daily ed., Nov. 19, 1975) (remarks by Sen. Randolph), by progressively increasing federal responsibility for such education.[25]

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[25] Pub. L. No. 89-10, 79 Stat. 27 [codified at 20 U.S.C. §§ 236-244 (1965)]; amended by Pub. L. No. 89-750, §161, 80 Stat. 1204[codified at 20 U.S.C. §§ 1201-1213 (1966)]; amended by Pub. L. No. 91-230, §§601-621, 84 Stat. 175-88 [codified at 20 U.S. C. §§ 1401-1461 (1970); amended by Pub. L. No. 93-380, §611-621, 88 Stat. 579-585[codified at 20 U.S.C. §§ 1401-1461 (Supp. 1975)]; amended by Publ. L. 94-142, 89 Stat. 773 [codified at 20 U.S.C. §§1401-1461 (1976)](Education for all Handicapped Children Act of 1975); amended by Pub. L. 101-476, 104 Stat. 1103 (1990)[codified at 20 U.S.C. §§ 1401 -1461].

H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975) (hereinafter "House Report"); S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), reprinted

At regional hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including parents, teachers, special education professionals, and other professionals experienced in the education and care of handicapped children, testify that substantial numbers of children with disabilities were excluded from school, denied necessary services, and subjected to educational neglect.[26] Parents and educators discussed the widespread failure of states to provide the breadth of supportive services necessary to meet the varied needs of children with

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in 1976 U.S.Code Cong, & Ad. News, 1425, 1429-32 (hereinafter "Senate Report")

[26] Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped for the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra*, n. 25 at 5-6.

disabilities. Prominent among the services discussed were many that would assist emotionally disturbed students and others whose disabilities included behavioral manifestations to benefit from and participate in special education programs, such as specialized diagnostic evaluations, individualized tutoring, behavior-modification programs, self-help and self-care skills training programs, and psychological counseling.[27]

Statistics compiled for Congress by the Office of Education estimated that of eight million children with disabilities in the United States, nearly two million were excluded from public schools, and more than four million of these children were receiving an inappropriate education.[28] Eighty-two percent of

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[27] Senate Hearings, *supra*, n.26 at 45, 87, 797, 809, 813, 790, 833.

[28] Senate Report, *supra*, n. 25, at 8; House Report, *supra*, n. 25, at. n. 12. Pub. L. No. 94-

those children classified as emotionally disturbed were unserved.[29]

Throughout the hearings, legislators specifically referred to the problem of exclusion.[30] Another widespread problem was flagged by Senator Brooke, who noted

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142,§3(a), 89 Stat 774 (1975)(reprinted in notes to 20 U.S.C. §1401), codified at 20 U.S.C. §1400(b)(1)-(4).

[29] *Id.*

[30] Senator Williams, chair of the subcommittee, summarized his observations as follows: "**Exclusion from school**, institutionalization, the **lack of appropriate services to provide attention to the individual child's need** -- indeed the **denial of equal rights** by a society which proclaims liberty and justice for all of its people -- are echoes which the subcommittee has found throughout all of its hearings ..." Senate Hearings, supra, n. 26 at 1155-56 (emphasis added).

Senator Mondale made similar observations:"For many years handicapped children have been placed in institutions, or segregated in schools and classes, or **left to sit at home**, where they have not received the educational opportunity which is their right under the law." Senate Hearings, supra, n. 26, at 1153 (emphasis added).

In an observation particularly pertinent to the issues of this case, David Bartley, Speaker of the Massachusetts House of Representatives, testified that "[c]hildren have been denied an education because of their adjudged incorrigibility or maladaptive behavior..." Senate Hearings, supra, n. 26 at 346

that although most state constitutions guarantee a right to education, "[m]ost states have legal provisions which authorize school authorities to exclude certain students from public schools." Hence, the Senator observed, states "deny those very children who most need help in being taught." Senate Hearings, *supra*, n.26 at 342.

Congress was aware that the kind of provisions expressly noted by Senator Brooke had in fact been successfully challenged in two prominent federal actions. See *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972)(herinafter *PARC v. Pennsylvania*); *Mills v. District of Columbia Board of Education*, 348 F.Supp. 866 (D.D.C. 1972). These cases established the principle that exclusion is unconstitutional.

Mills, for example, held the exclusion of all handicapped children, whether they were labeled retarded, hyperactive, or "behavior problems" to be violative of the equal protection principles embodied in the Fifth Amendment; and that due process requires that a full and fair hearing precede exclusion from or placement in a special education program. *Id.* at 875.[31] As this Court has repeatedly recognized, Congress enacted IDEA in order to make real the rights recognized in *Mills* and *PARC*. *See Rowley, supra*, 458 U.S. at 192; *Honig, supra*, 484 U.S. at 324-325.

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[31] See House Report, *supra*, note 25 at 3-4. In the consent agreement in *PARC v. Pennsylvania, supra*, the court acepted plaintiffs' position based on expert testimony that all retarded children are capable of benefitting from education and training, and therefore, could not be excluded on the basis of handicap.

C. The issues raised herein require resolution by this Court before the harms of inappropriate juvenile court actions are further multiplied.

Petitioner's experience is not an anomaly. In the five years since this Court's decision in *Honig v. Doe, supra,* (discussed further in Section II. *infra*) children with behavioral or emotional disorders have increasingly been targets of alternative schemes for removing them from public education programs. Chief among them is the practice of which the Petitioner here was a victim: the filing and prosecution of Child In Need of Services, delinquency and similar juvenile petitions against emotionally disturbed children for in-school, disability-related behavior, followed by dispositions that ignore IDEA rights. (See Section III, *infra*, for examples of specific state proceedings.)

The practice of consigning students with disabilities to the juvenile justice system, if unchecked, poses a risk to the 392,161 children nationwide (4,268 in Louisiana) who have been identified as emotionally disturbed[32], whose IDEA rights are at stake.

Absent a ruling by this Court making it clear that IDEA does circumscribe the dispositional authority a State may grant

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[32] Office of Special Education Programs, U.S.Office of Special Education and Rehabilitative Services, U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children With Disabilities: Fourteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act* (1992) at A-6.

This number is underinclusive, because children labelled as behavior disordered or emotionally disturbed are not the only children with disabilities who exhibit behaviors, related to those disabilities which may result in their being referred to the juvenile justice system. For example, children with mental handicaps or severe learning disabilities also frequently exhibit challenging behaviors. Such children are significantly overrepresented in juvenile detention facilities. C. Nelson, "Handicapped Offenders in the Criminal Justice System", *Special Education in the Criminal Justice System*, C.M. Nelson, R.B. Rutherford, and B.I. Wolford, editors, Merrill,1987, pages 2-17.

its juvenile courts in such proceedings, both inappropriate resort to those courts and abrogation of IDEA rights through improper educational decision-making by juvenile courts will continue unabated, encouraged by the decision of the Louisiana Court of Appeal. In Louisiana, such abuses will likely increase, placing the state's children with disabilities at even greater risk. Only prompt intervention by this Court will protect Louisiana children and youth whose disabilities manifest themselves through difficult behaviors, and ensure that other state courts do not follow Louisiana's lead.

II. The Louisiana court has decided a federal question in a way that conflicts with this Court's decision in *Honig v. Doe*

The Louisiana Court of Appeal relied exclusively upon this Court's

decision in *Honig v. Doe, supra,* to conclude that IDEA placed no limits on the authority of the juvenile court to limit the availability of appropriate special education and related services to Petitioner, dictate the details of his education, and otherwise abrogate his federal rights. The Louisiana court not only construed *Honig* far too broadly, but rendered a decision completely at odds with it.

In *Honig*, this Court addressed for the first time rights of disabled students alleged to be disruptive or dangerous in school. The case stemmed from an action challenging the indefinite suspensions of two emotionally disturbed students who were excluded from school because they were considered dangerous and disruptive. The Court of Appeals had affirmed the trial court's determination

that 20 U.S.C. §1415(e)(3) applied to the attempts to expel the students. The State of California argued that there must be an exception to §1415(e)(3) for dangerous students. This Court rejected California's argument, stating that the express language of IDEA was "unequivocal," and refusing "to read a 'dangerousness' exception into" the statute. *Honig*, 484 U.S. at 323. The Court also noted Congress' intent, apparent from the legislative history of the Act, to safeguard the education rights of all disabled students, particularly those with serious emotional disturbance. *Id.* at 309.

Honig thus stands for the proposition that students with disabilities may not be stripped of their rights under IDEA simply because they are disruptive or dangerous. In order to

safeguard those rights and to strike a balance between emotionally disturbed students' "interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA [IDEA]...[and] the interests of state and local school officials in maintaining a safe learning environment for all their students," *Honig*, 484 U.S. at 328, the Court allowed that in exigent circumstances involving truly dangerous students, school officials may request competent courts to order that a student be temporarily excluded from school. *Id.*

Contrary to the conclusion of the Louisiana Court of Appeal, *Honig* did not raise, and this Court did not address, the extent to which state courts in various kinds of state law proceedings may with impunity issue orders that

contravene IDEA rights. *Honig* addressed judicial authority in one very specific context, holding only that §1415(e)(3) does not "limit the equitable powers of district courts such that they cannot, in appropriate cases **temporarily** enjoin a **dangerous** disabled child from attending school," *Honig*, 484 U.S. at 327 (emphasis added), because "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts **by §1415 (e) (2).**" *Id.* (citation omitted) (emphasis added). That §1415(e)(3), when applicable, does not preclude such equitable relief does not mean that States may accept IDEA monies and then endow their juvenile courts with unlimited statutory authority to strip children of their IDEA rights.

Honig assumes four conditions as prerequisites to a valid court order

excluding a disabled child from school: that §1415(e)(3) is applicable, meaning that a due process hearing or review, pursuant to §1415(b),(c), or a civil action pursuant to §1415(e)(2) is pending in which a final determination will be made regarding appropriate educational services for the child consistent with IDEA requirements; that the order excluding the child is a temporary one, pending completion of those proceedings; that the court issuing the order is a federal district court or a state court of competent jurisdiction hearing a civil action brought pursuant to §1415(e)(2); and that the child has been proven in court to be dangerous. *Honig*, 484 U.S. at 327. The latter requires a showing that "maintaining the child in his or her current placement is substantially likely to result in injury either to himself or

herself, or to others." *Honig*, 484 U.S. at 328.

None of these conditions are present in the instant case. The juvenile court that ordered Petitioner excluded from school is not competent under Louisiana law to hear civil actions pursuant to §1415(e)(2)[33], and there were no proceedings pending under §1415(b)(c) or (e)(2) in which ultimate educational determinations would be made consistent with IDEA requirements.[34] The juvenile court thus was not competent to, and in fact did not, "temporarily enjoin

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[33] The Louisiana Constitution, Article V.§ 18, provides that juvenile courts have jurisdiction as provided by law. The Children's Code does not confer any jurisdiction on such courts to provided judicial review special education administrative proceedings. Indeed, La. R.S.49:464 clearly vests civil district courts, rather than juvenile courts, with jurisdiction over judicial review of adjudication proceedings.

[34] Such proceedings have not been invoked because the school system's failure to implement Petitioner's IEP is solely due to the juvenile court judgment at issue herein.

a...disabled child from attending school," *Honig*, 484 U.S. at 327, pending such determinations. Rather, through its disposition it prohibited him from receiving anything except homebound instruction for the next four years, an action which even a court of competent jurisdiction would not be permitted to take. Moreover, the behavior for which the juvenile court barred Petitioner from school did not approach the standard for dangerousness that *Honig* sets.

Furthermore, *Honig* does not contemplate a court acting *sua sponte* as an educational decision-maker, as was the case here, but rather a court granting equitable relief at the request of professional educators, see 484 U.S. at 328, who in order to prevail must not only overcome "a presumption in favor of the child's current educational

placement...by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others," *Id..*, but must also satisfy the traditional, rigorous criteria for injunctive relief.[35] Presumably, this requires presentation of competent, credible evidence and testimony informed by the professional judgment of competent educators familiar with the child, his or her history and evaluation data, and various placement options. *Honig* thus assumes parties, evidence and the fulfillment of remedial standards not part of the Louisiana proceeding to which Petitioner was subjected.

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[35] See, *e.g. Texas City Independent School District v. Jostad,* 752 F.Supp 231,233,238 (S.D. Tex.1990), noting that injunctive relief is an "extraordinary remedy," and applying the criteria of *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 568 (5th Cir. 1981) to school district request for *Honig* injunction.

III. The Louisiana court has decided a federal question in a way that conflicts with the decisions of other state courts which have considered the question.

By refusing to harmonize Louisiana's juvenile jurisdiction statutes with the requirements of federal law, the Louisiana appellate court has so deviated from judgments on similar issues in other states as to warrant review by this Court.

Appellate courts in other states which have faced the issue of the jurisdiction of juvenile courts to rule on special education issues have uniformly ruled that such courts do not have the power to issue orders inconsistent with the substantive or procedural precepts of the IDEA. *In re Tony McCann*, C.A. No. 158 (Ct. App. Tenn. 1990), 17 EHLR 551 (juvenile court may not order the cessation of all educational services to

a special education student); *Oscar F. v. County of Worcester*, 587 N.E. 2d 208 (Mass. 1992),(juvenile judge lacks authority to order a specific educational placement); *In the Matter of Shelly Maynard*, Fam.Ct., 453 N.Y.S. 2d 352 (1982) (school system must fulfill its responsibilites to provide an appropriate special education placement for a disabled child before the court would become involved in truancy issues); *In the Interest of J.D*, 510 So. 2d 623 (Fla. App. 1 Dist. 1987)(juvenile court's dependency jurisdiction does not extend to educational issues for which remedies and procedures are set forth in the IDEA); *Flint Board of Education v. Williams*, 276 N.W. 2d 499 (Mich. App.,1979) (school system may not ask probate court to take jurisdiction over a special education student until

administrative proceedings under the school code's special education provisions have terminated and a final decision has been made that no program within the school system can serve the child's needs).

This unanimity of results in other states does not, however, render the Louisiana decision a mere aberration unworthy of attention by this court. Most state courts have not addressed these issues at all. Those which have employ different legal analyses, and the scope of their decisions vary widely. Moreover, in each of the above-cited cases, the juvenile courts had assumed jurisdiction over disabled students and issued orders related to their educational programming. Although this interference was eventually declared inappropriate by appellate courts, the harms of inconsistent

treatment under juvenile and education codes had already occurred.

As discussed above, special education students frequently come in contact with the juvenile justice system. It is highly likely that these harms are being multiplied in juvenile courts nationwide, often in cases which are never appealed. Due to this patchwork of varying state laws, state decisions based on differing facts and analyses, and absence of any guidance in most states, guidance from this Court is needed.

CONCLUSION

The draconian consequences faced by plaintiff underscore the urgency of review and reversal by this court. Petitioner, who has substantial need for special education and related services, and whom school officials wish to

continue educating in the public schools, has been ordered to spend his adolescence at home, isolated from his peers, with only the minimal educational services and interventions possible in that setting. This abrogation of his IDEA rights occurred as a consequence of in-school behavior related to the student's disability: a manifestation of the very disability that triggered his need for and entitlement to protection and services under IDEA, and the very behavior that IDEA requires States to attempt to ameliorate through the provision of a free appropriate public education. Intervention by this Court will vindicate Petitioner's rights and salvage his future.

This substantial and significant issues posed by this case warrant review by this Court because of the frequent and

growing involvement of children with disabilities, particularly behavioral disabilities, with the juvenile justice system. The lack of specific guidelines regarding the effect of special education laws on such systems have resulted in many of the harms which IDEA was designed to eliminate. A clarification and thoughtful anaysis of this complex issue is needed. This honorable Court should therefore grant a writ of certiorari to the Louisiana Court of Appeal in order to reverse this specific violation of federal special education law and to resolve the issue of the authority of state courts of juvenile jurisdiction to limit the rights of students with disabilities under IDEA.

Respectfully submitted,

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May 20, 1993

92-1862

NO.

Supreme Court, U.S.
FILED
MAY 20 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1992

B. C., JR.,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NUMBER CR 92-826

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA December 9, 1992

IN THE INTEREST OF B.C., JR.

Appellant

On Appeal from the Thirty-Fifth Judicial District Court, Parish of Grant, State of Louisiana; Honorable B.G. Lutes, Judge, Presiding

Before: LABORDE, THIBODEAUX, and CULPEPPER[1], Judges

LABORDE, Judge.

In this juvenile matter, the juvenile, B.C., Jr. appeals a condition of his probation that he receive home-bound instruction. Finding no error on the part of the juvenile court, we affirm.

FACTS

On September 18, 1991, the district

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[1] Judge Culpepper, retired, participated in this decision as Judge Pro Tempore.

attorney for the parish of Grant filed a petition of adjudication asking that the juvenile, B.C., Jr. (B.C.) be declared a child in need of supervision. The petition alleges that the juvenile was involved in continuous and long term disruptions at school, disturbances at school, fighting and hitting incidents at school, and batteries on classmates. The petition resulted from complaints filed with the Grant Parish Sheriff's office by two of the juvenile's classmates. The initial complaint was brought by a girl who complained that the juvenile intentionally ran over her while pushing her into a pole. This incident caused injury to the girl, but the extent of her injuries is not apparent from the record. The second complaint was brought by a boy who alleged that the juvenile threatened to beat him up if he did not relinquish

his lunch money. Upon his refusal to give the money, the juvenile choked him and had to be physically restrained by a teacher. Further, the juvenile coerced a third child to stab the complaining child in the last incident in the stomach with a pencil. This coercion was accomplished by telling the assailant that if he did not stab the complainant that the juvenile would beat him up.

Also contained in the record are numerous letters from teachers reflecting the juvenile's lack of respect for authority figures and abusive behavior towards others. On October 2, 1991, the juvenile court declared B.C. a child in need of supervision (CINS) and ordered him to receive home bound instruction.

A pre-dispositional investigation and psychological evaluation were filed with the juvenile court on October 22, 1991, along with a motion to modify or

rescind the juvenile court's order for homebound instruction. Subsequently, a hearing was held wherein testimony was elicited during which counsel agreed to submit the remainder of the matter on briefs. A second hearing was held on June 3, 1992, and the juvenile court rendered a judgment and disposition declaring the juvenile a CINS. The disposition included, as a special condition of probation, continued homebound instruction as provided by the Grant Parish Board of Education. The juvenile court ordered this homebound instruction to continue until October 20. 1995.

It is from this condition of probation which the juvenile appeals asserting three assignments of error.

ASSIGNMENTS OF ERRORS NUMBERS ONE AND TWO

The first two assignments will be discussed simultaneously as both involve

Title 20 U.S.C. sections 1400 et seq. At the outset, it should be noted that as a matter of law, juvenile action is neither criminal nor civil but of its own kind. In Re State in the Interest of Curley, 287 So. 2d 558 (La. App. 1st Cir. 1974).

In his first two assignments of error, the juvenile contends that a juvenile court does not have subject matter jurisdiction to order special educational placements nor does it have the power to order non-parties to provide specific services to juveniles found to be in need of supervision. The juvenile further alleges that this condition of probation erroneously overrules an IEP committee ruling in violations of 20 U.S.C. section 1400 et seq.

The juvenile argues that homebound instruction is not a dispositional option

under La.Ch.C.art.792.53 which provides:

Art. 792.53. Disposition: children in need of supervision.

In a case in which a child has been adjudicated to be in need of supervision, the court may do any of the following:

(1) Place the child in the custody of a parent or other suitable person on such terms and conditions as deemed in the best interest of the child and the public.

(2) Place the child on probation on such terms and conditions as deemed in the best interest of the child and the public.

(3) Assign the child to the custody of a private or public institution or agency.

(4) Commit a child found to be mentally defective to a public or private mental institution or an institution for the mentally defective.

(5) Make such other disposition or combination of the above dispositions as the court deems to be in the best interest of the child.

(6) Commit the child to the Department of Public Safety and Corrections for care and treatment. The department, however, shall not place a child in need of supervision in a correctional facility designed and operated exclusively for delinquent children.

Added by Acts 1991, No. 235, §7, eff. Jan. 1, 1992.

However, under the broad language of La.Ch.C.art.792.53(2), we find the juven-

ile court has the authority to place the child on homebound instruction. Furthermore, La.Ch.C.art.681(5) gives the juvenile court the authority to order any action deemed to be in the best interest of the child. Nothing in this legislation indicates ordering homebound instruction is an improper action on the part of the trial court. This article states the following:

Art.681. Dispositional alternatives

A. In a case in which a child has been adjudicated to be in need of care, the court may:

(1) Place the child in the custody of a parent or such other suitable person on such terms and conditions as deemed in the best interest of the child including but not limited to the issuance of a protective order pursuant to Article 618.

(2) Place the child in the custody of a private or public institution or agency.

(3) Commit a child found to be mentally ill to a public or private mental institution or institution for the mentally ill.

(4) Grant guardianship of the person of the child to any individual.

(5) Make such other disposition or combination of the above dispositions as

the court deems to be in the best interest of the child.

The record is replete with the juvenile's propensities for violence aimed at other students and teachers. The protection of these persons is encompassed by La.Ch.C.art.681(5). Further, the Department of Public Safety and Corrections recommended continued home-bound study in its pre-dispositional investigations. This recommendation may be considered by the court under La.Ch.C. art. 680.

> The court may consider the report of the predisposition investigation, and reports of mental evaluation, and all other evidence offered by the child or the state relating to the proper disposition. The court may consider evidence which would not be admissible at the adjudication hearing.

The juvenile further argues that inherent in federal and state laws are special regulations regarding students with disabilities and their educational treatment by the courts. Individual

Disabilities Education Act (IDEA) at 20 U.S.C. section 1400 et seq. However, the IDEA only applies to a school system's authority to expel or place handicapped students; it does not limit the authority of juvenile courts. Bill Honig, California Superintendent of Public Instruction, Petitioner v John Doe and Jack Smith, 484 U.S. 330 S.Ct. 592, 98 L.Ed. 686. In Honig, supra, the Court stated:

> Nor do we think that §1415(e)(8) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of §1415(e)(8), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S., at 878, 105 S.Ct., at 2004 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority

conferred on courts by §1415(e)(2), see *Doe v. Brookline School Committee*, 722 F.2d 910,917 (CA 1988); indeed, it says nothing whatever about judicial power.

It is apparent the juvenile court did not exceed its authority by placing the juvenile on homebound studies as part of his probation. Furthermore, a disposition may be modified on the court's own motion, or a motion filed by the district attorney, the parents, or the child. La.Ch.C.art.792.60. If at a later period of time, the best interest of the public and the child would no longer be to homebound the child, the court could then modify this condition. We therefore find the juvenile court had sufficient statutory authority to place the juvenile on homebound instruction as a condition of his probation. We further find the IDEA does not apply to a juvenile court judgment ordering a juvenile to be educated in a residential setting.

The juvenile also alleges the court does not have jurisdiction or authority to order the Grant Parish School board to teach the juvenile at home in his first two assignments of error. He contends this condition is not expressly granted by La.Ch.C.art. 792.53, supra. He further contends the court lacks personal jurisdiction over the non-party school board since the school board is not a party to this action. In essence, the juvenile is actually contending he is in a proper legal position to challenge the court's authority over the Grant Parish School Board. The juvenile's allegation that the court lacks personal jurisdiction, lends itself to the argument that the issue is in fact personal to the Grant Parish School Board. La.C.C.P.art. 381

provides:

> Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

This article is made applicable to the instant case by La.Ch.C. art. 104, which provides:

> Where procedures are not provided in this code or otherwise by law, the court shall proceed in accordance with:
>
> (1) The Code of Criminal Procedure in a delinquency proceeding and in a criminal trial of an adult.
> (2) The Code of Civil Procedure in all other matters.

The juvenile in this case does not have standing to challenge the court's authority over a third person not a party to the instant action. Further, Grant Parish School Board may intervene on its own behalf if it so desires. Assignments of error numbers one and two therefore lack merit.

ASSIGNMENT OF ERROR NUMBER THREE

In this assignment of error, the juvenile contends it was not proven by clear and convincing evidence that an educational placement in accordance with the IEP Committee decision was in the best interests of both the juvenile and the public. He alleges that under La.Ch.C. art. 792.54, the court should impose the least restrictive disposition. La.Ch.C.art. 792.54 states the following:

Art. 792.54. Disposition; generally

A. The court should impose the least restrictive disposition which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society. The court shall not remove a child from the custody of his parents unless his welfare or the safety and protection of the public cannot, in the opinion of the court, be adequately safeguarded without such removal.

B. If the court commits a child to a private institution or agency, it shall select one that has been licensed under state law. Where no institution, social agency, or association so licensed for care or placement of children is available to the court, the court may

commit the child to some other institution, social agency, or association which in the court's judgment is suitable for such child.

C. In committing a child to the custody of an individual or a private agency or institution, the court shall, whenever practicable, select a person, agency, or institution of the same religious faith as the child or his parents.

D. A child shall not be committed to a public or private mental institution or institution for the mentally defective unless the court finds, based on psychological or psychiatric evaluation, the child has mental disorder, other than mental retardation, which has a substantial adverse effect on his ability to function and requires care and treatment in an institution. The finding of such mental disorder shall not be made without the presence and participation of an attorney appointed from the Mental Health Advocacy Service (M.H.A.S.) to represent the child at the dispositional or modification hearing, unless attorneys from the M.H.A.S. are unavailable as determined by the director, or the child retains private counsel who shall represent only the interest of the child. The M.H.A.S. attorney so appointed shall continue to represent the child in any proceeding relating to admission, change of status, or discharge from the mental hospital or psychiatric unit. Upon modification of the disposition to a placement other than a mental hospital or psychiatric unit, the M.H.A.S. attorney shall be relieved of representation of the child.

The provisions of this Paragraph shall apply only to children who are in the custody of the state of Louisiana.

E. A child shall not be committed to a public or private institution for the mentally retarded unless the court finds, based on psychological or psychiatric evaluation, that the child is mentally retarded and such condition has a substantial adverse effect on his ability to function and requires care and treatment in an institution.

F. A child may be placed by the court in the custody of a relative or other responsible individual which for the purpose of the review hearing as provided for in Chapters 15 and 16 of Title VI shall be considered a permanent plan.

G. The Department of Public Safety and Corrections shall have the sole custody of a child committed to the department under this Chapter and shall determine the placement, care, and treatment of the child, and the expenditures to be made therefor.

The juvenile further contends that the evidence reveals that it is not in the best interest of the child or society to place this condition on his probation. However, we find La.Ch.C. art. 792.54 contemplates a disposition which affects the custody of a child and not an

educational placement. Every paragraph in the article implies a custodial or committal situation, and the custody of this juvenile is not at issue in this case. By suspending his sentence, the court allowed custody to remain with the parent. Under the statutory authority asserted above, parental custody is the least restrictive disposition. It is this custody that La.Ch.C. art. 792.54 contemplates and not any conditions of probation regarding a child's education.

The pre-dispositional investigation recommends homebound instruction and acknowledges the juvenile's violent propensities toward others. The only contradictory evidence in the predispositional investigation is a recommendation of Dr. D. H.. Texada, a psychiatrist who evaluated the child. Dr. Texada believes homebound instruction is not in the best interest of the juvenile;

however, the court must also consider the best interest of society under the Children's Code. Based upon the juvenile's past behavior exhibiting aggressiveness toward his classmates and teachers, we find it is the best interest of both the juvenile and society to continue with the juvenile's homebound instruction. The juvenile court therefore committed no error in so holding, and this assignment of error lacks merit.

DECREE

The decision of the juvenile court is affirmed. All costs of this appeal are assessed against the juvenile, B.C., Jr.

AFFIRMED.

Number J-760

STATE OF LOUISIANA IN THE INTEREST OF BENNETT COLLINS, JR. DOB: 10-20-78	JUVENILE COURT 35th JUDICIAL DISTRICT COURT

FILED JUNE 3, 1992

JUDGMENT OF DISPOSITION

This case came before the Court this day on a petition filed in regard to the above named juvenile and after consideration of evidence together with the testimony of witnesses.

IT IS THE FINDING OF THE COURT that the above named child Bennett Collins, Jr. is:

( ) delinquent and in need of the protection of the State.

(X) in need of supervision, and in need of the protection of the State.

IT IS THEREFORE ORDERED AND DECREED THAT Bennett Collins, Jr. be committed to the care and custody and control of:

( ) Department of Corrections until ___ day of _____, 19_____.

(X) Department of Corrections with placement suspended and placed on active supervised probation under the supervision of the Division of Youth Services until the 20th day of October, 1995.

GENERAL CONDITIONS OF PROBATION ARE:

(1) Obey your parents.

(2) Indulge in no unlawful, disorderly, injurious or vicioius habits of conduct, keep good company and reasonable hours.

(3) Follow your probation officer's advice and suggestions.

(4) When notified to report, do so promptly.

(5) Phone or write your probation officer if you cannot report.

(6) Work or attend school regularly.

(7) Do not leave the jurisdiction of this Court without permission.

SPECIAL CONDITIONS OF PROBATION ARE:

(1) Continued participation in the Child and Adolescent Services System Program (CASSP).

(2) Continued home bound instructions as provided by the Grant Parish Board of Ed.

(3) Attend other appropriate counseling as indicated.

THUS RENDERED on this 3rd day of November June, 1991.

(s) B. G. Lutes, Judge

35th Judicial District Court

Colfax, LOUISIANA

35TH JUDICIAL DISTRICT COURT

PARISH OF GRANT

IN THE INTEREST OF THE MINOR

BENETT COLLINS

D.O.B. 10-20-78

O R D E R

IT IS HEREBY ORDERED that BENETT COLLINS be given home bound instruction by the appropriate educational agency pending further orders of the Court.

IT IS FURTHER ORDERED that all appropriate social, psychological and educational materials be given to the Department of Public Safety and Corrections to aid them in the supervision of this juvenile.

THUS DONE AND SIGNED on this the 2nd day of October, 1991, Colfax, Grant Parish, Louisiana.

(s)_____

B.G. LUTES, DISTRICT JUDGE

THE SUPREME COURT OF THE STATE OF LOUISIANA

IN THE INTEREST OF B.C., JR.

NO. 93-CK-0040

IN RE:-- Confidential Party --; - Plaintiff(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writ; to the Court of Appeal, Third Circuit; Number CR92-0826; Parish of Grant 35th Judicial District Court Number J-706

February 19, 1993

Denied.

HTL

PFC

WFM

JLD

JCW

PH

KIMBALL, J., would grant the writ.

ORTIQUE, J., not on panel

Supreme Court of Louisiana
February 19, 1993

(s)
Clerk of Court for the Court

RULE IX. REHEARINGS

Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court, or when an election case has been decided as provided by Rule X, Section 4(c).

Amended and effective May 27, 1976.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C.

Sec. 1400. Congressional statements and declarations

(a) *Short title*

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) *Findings*

The Congress finds that--

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are

excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide

effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) *Purpose*

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

Sec. 1401. Definitions

(a) *As used in this chapter--*

(1)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other

health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services...

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, or Palau (until the compact of Free Association with Palau takes effect pursuant to section 101(a) of Public Law 99-658).

(7) The term "State educational agency" means the State board of Education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education....

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title....

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting.

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

Sec. 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State wil undertake or has undertaken in order to assure that;

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all

children with disabilities between the ages of three and eighteen within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related

services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not

receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disabilitiy, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established

(A) procedural safeguards as required by section 1415 of this title;

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other

care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and

(C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and

no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public

education to be provided children with disabilities in the State.

(7) The State shall assure that

(A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Sec. 1415. Procedural safeguards

(a) *Establishment and maintenance*

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) *Required procedures; hearing*

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free

appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initate or change, the identification, evaluation, or educational placement of the child or the

provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the

local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) *Review of local decision by State educational agency*

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory

panel established pursuant to section 1414(a)(12) of this title.

(e) *Civil action; jurisdiction*

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hearing additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offfer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlment.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be

made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violaton of this section.

(f) *Effect on other laws*

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections(b)(2) and (c) of this section shall be exhausted to the same extent as

would be required had the action been brought under this subchapter.

34 CFR, PART 300 Selected Sections

Sec. 300.7 Children with disabilities

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with Secs. 300.530 -300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impariments need special education and related services. ...

(b) The terms used in this definition are defined as follows: ...

(9) "Serious emotional disturbance" is defined as follows:

(1) The term means a condition exhibiting one or more of the following

characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance --

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under nomal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

Sec. 300.305 Program options

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services avialable to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

Sec. 300.343 Meetings

(a) *General*

Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrene of the parents, an individualized family service plan des ribed in section 677(d) of the Act for

each child with a disability, aged 3 through 5)....

(c) *Timeline*

A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review*

Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

Sec. 300.344 Participants in meetings

(a) *General*

The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher,

who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Sec. 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel*

For a child with a disability who has been evaluated for the first time, the public agency shall ensure--

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) *Transition services participants*

(1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite--

(i) The student; and

(ii) A representative of any other agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

Section 300.533 Placement procedures

(a) In interpreting evaluation data and in making placement decisions, each public agency shall--

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendatons, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in Secs. 300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Secs. 300.340-300-350.

Sec. 300. 551 Continuum of alternative placements

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) the continuum required in paragraph (a) of this section must --

(1) Include the alternative placements listed in the definition of special education under Sect. 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room on itinerant instruction) to be provided in conjunction with regular class placement.

Sec. 300.552 Placements

Each public agency shall ensure that:

(a) The educational placement of each child with a disability--

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at Sec. 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the

school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

§ 449. Homebound Placement Rules

The placement of an exceptional child, excluding children whose only exceptionality is hospital/ homebound, by a school system in a program of homebound or hospital instruction may be proposed only if one of the following exists:

A. The exceptional child possesses a physical impairment or illness which directly (or because of treatment required) precludes the child's movement from a hospital or home environment to the general educational environment.

B. Consistent with the requirements of these Regulations, the child has been determined to be seriously emotionally disturbed and:

1. A psychologist or psychiatrist who is licensed to prectice in Louisiana

has certified in a signed written report filed with the Office that the child is admitted to a full-time inpatient program of care and treatment in a hospital certified or licensed by the State of Louisiana and that continued participation in the inpatient program is necessary to the proper care and treatment of the child.

2. A psychologist or psychiatrist who is licensed to practice in Louisiana has certified in a signed written report submitted to the school system and filed with the Office that:

a. The child is seriously emotionally disturbed.

b. The child is being provided a program of continuous care and treatment which would be seriously disrupted by movement to the general educational environment.

c. The program of care and treatment in concert with the proposed homebound instruction should permit the return of the child to the general educational environment at a specified date.

d. A copy of the treatment plan for the child signed by the psychiatrist or psychologist is attached to the written report together with a statement that the psychiatrist or psychologist will notify the school system if the treatment plan is significantly changed or discontinued.

C. A child who is awaiting approval of Regional Review for placement in a residential facility and form whom a school-based interim program has been unsuccessfully implemented because of the severity of the handicap of threat of danger to self or others.

D. An exceptional child is detained by court order in a juvenile detention facility.

E. An exceptional child is undergoing disciplinary actions. Time limits are subject to the provisions of § 459.

LOUISIANA DEPARTMENT OF EDUCATION
PUPIL APPRAISAL HANDBOOK
BULLETIN 1508
REVISED 1983

PAGE 41 BEHAVIOR DISORDERED

I. DEFINITION

A behavior disorder is a pattern of situationally inappropriate interpersonal or intrapersonal behavior which is exhibitted over an extended period of time and to a significant degree, and which cannot be explained by intellectual, sensory, neurological, or general health factors. One or more of the following behavior patterns shall be exhibited:

A. Inappropriate types of behavior or feelings under normal circumstances;

B. A general pervasive mood of unhappiness, depression, or withdrawal; or

C. A tendency to develop ohysical symptoms or fear associated with personal or school problems.

The term never includes students who are autistic: it may include students who are socially maladjusted if it is determined that they are also behavior disordered.

NOTE: Children with behavior problems brought on by a temporary crisis situation, such as death in the family, illness, or other economic or social problems are generally not included in this category unless all eligibility criteria are met.

35TH JUDICIAL DISTRICT COURT
PARISH OF GRANT
IN THE INTEREST OF THE MINOR
BENETT COLLINS
D.O.B. 10-20-78 FILED OCTOBER 22, 1991

MOTION TO MODIFY OR RESCIND ORDER

The Motion of Benett Collins, represented herein by the Advocacy Center for the Elderly and Disabled, Margherita McWilliams, attorney, respectfully states that:

1.

On October 2, 1991, this Honorable Court, in the above-captioned matter involving the juvenile, signed an Order which required the juvenile to receive educational services in a homebound program. This Court was not made aware of local, State, or Federal laws and regulations concerning educational placement for handicapped students.

2.

The juvenile shows that he is classified pursuant to State and Federal

law as a student with a handicap, namely, a behavior disorder, which entitles him to rights and protection afforded him under the Inditivituals with Disabilities Education Act, 20 USC 1401 *et seq.* and the Louisiana Exceptional Children's Act, LA R.S. 17:1941 *et seq.*

3.

The State and Federal statutes cited above provide specific procedures for determining the nature and placement of an educational program for handicapped students. These procedures require school districts to evaluate the special educational needs of a handicapped child and to meet with parents in team meetings to decide the nature of services and programs to be provided the child.

4.

Grant Parish School Board is currently supplying a teacher at Benett Collins' home, in accordance with this

Court's October 2, 1991 Order. However, following this Court's October 2, 1991 Order, on Otober 11, 1991, personnel of Grant Parish School Board met with the parent of Benett Collins. Present were Rhonda Collins; Benett Collins, represented by the undersigned counsel; Brian Hines, Principal of Montgomery-Gaines Junior High School; Ollie Goudeau, Supervisor of Special Education, Grant Parish School Board; a school psychologist; and Benett Collins' special education teacher. This team agreed that Benett Collins should return to Montgomery-Gaines Junior High School with a full-time aide assigned to control his behavior and a restricted classroom setting. Grant Parish School Board also reversed its recommendation of expulsion for Benett.

5.

Counsel for Benett Collins respectfully suggests that this Court, acting as a juvenile court, lacks jurisdiction over the educational program provided to Benett Collins, under the provisions of State and Federal law. It is respectfully requested, therefore, that this Honorable Court rescind its Order of October 2, 1991.

6.

In the alternative, it is respectfully submitted that this Court should defer to the professional judgment of the educational personnel who have recommended a return to school for Benett Collins, subject to certain restrictions.

7.

It is further suggested that a hearing on this Motion be set prior to the November 14, 1991 disposition hearing to avoid undue hardship to the juvenile

and to allow Grant Parish School Board to implement its recommendations for educating Benett Collins.

WHEREFORE, MOVANT, Benett Collins respectfully requests that this Court set hearing on this Motion, and that after due consideration of the issues presented, it grant this Motion to Rescind its October 2, 1991 Order, or modify it as suggested herein.

Respectfully submitted,

THE ADVOCACY CENTER FOR THE ELDERLY AND DISABLED
(s)_____
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CERTIFICATE OF SERVICE

I cetify that a copy of the above and foregoing Motion has been served on opposing counsel, James Lewis, Assistant District Attorney, by mailing a copy of same to him, first class, postage prepaid, at his office address, P.O. Box 309, Colfax, LA 71417 on this 18th day of October, 1991.

35TH JUDICIAL DISTRICT COURT

PARISH OF GRANT

IN THE INTEREST OF THE MINOR

BENETT COLLINS

D.O.B. 10-20-78

O R D E R

Considering the above and foregoing Motion to Modify or Rescind Order,

IT IS ORDERED that a hearing on this matter be set on the 14th day of November, 1991.

THUS DONE AND SIGNED this 22nd day of October, 1991, Colfax, Grant Parish, Louisiana.

(s)_____
B.G. LUTES, District Judge

JUVENILE DOCKET NUMBER J-760

STATE OF LOUISIANA IN THE INTEREST OF BENNETT COLLINS	35TH JUDICIAL DISTRICT COURT JUVENILE COURT
FILED MAY 1992	PARISH OF GRANT

MOTION

NOW INTO COURT comes Benett Collins, a minor, represented herein by undersigned counsel, who respectfully submits to the Court that the Order of this Court, dated October 2, 1991, which ordered the child to receive his special educational services in a homebound setting, should be set aside, and that the minor should be retuirned to his least restrictive educational setting, in accordance with recommendations of the Grant Parish School Board, for the following reasons:

1.

The minor, through his counsel, filed a Motion to Modify or Rescind Order on October 22, 1991, seeking to set aside

or to modify the Court's order that he receive homebound educational services. The Motion was set for hearing on November 14, 1991.

2.

Following the November 14, 1991 hearing, this Court ordered that counsel for both parties, the State of Louisiana and the minor, submit briefs to aid the Court in reaching its decision. Counsel for the minor submitted her Memorandum on November 27, 1991.

3.

Counsel for the State of Louisiana has not filed a brief or memorandum as ordered by this Court. Counsel for the minor communicated with counsel for the State on February 24, 1992, concerning his Memorandum, but has had no further communication since that time.

4.

The Memorandum filed by counsel for the minor shows that this Court lacks

jurisdiction to render an order requiring the minor to receive homebound educational services, thus said Order must be set aside.

5.

Testimony adduced at the November 14, 1991 hearing shows that appropriate personnel from the Grant Parish School Board had recommended that Benett Collins return to Montgomery-Gaines Junior High School. The recommendations of the school board, and the legal effect of the aid recommendations as they relate to the minor's educational services, are fully discussed in counsel's Memorandum.

6.

In addition, Grant Parish School Board has recently completed a re-evaluation of the minor's special educational needs, in accordance with state and federal law and regulation. The evaluation, dated January 22, 1992,

includes recommendations from a psychiatrist, Dr. Paul D. Ware. Dr. Ware recommends that the minor return to school. (Exibit A, attached).

7.

The minor, his mother, and the Grant Parish School Board, Special Education Department, desire that Benett Collins return to school, where he may receive special educational services to address his behavior problems.

8.

Counsel for the minor suggests that, in considering the law and the evidence presented by the minor, and also considering the fact that counsel for the State of Louisiana has failed to offer any legal justification for its opposition to the original Motion to Modify and Rescind, this Court should now rescind its October 2, 1991 Order.

9.

In the alternative, and only in the alternative that this Court believes it necessary to hear additional testimony, counsel for the minor suggests that a new hearing be set on this instant Motion.

WHEREFORE, Benett Collins respectfully requests that this Court immediately rescind and revoke its Order of October 2, 1991, which required the minor to be restricted to the receipt of educational services in his home.

IN THE ALTERNATIVE, and only in the alternative that this Court should deem it necessary to take additional or new evidence, the Court is requested to set this Motion for a hearing, at which time a ruling may be made.

Respectfully submitted,

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SUPREME COURT

STATE OF LOUISIANA

NO. 93-CK-0040

IN THE INTEREST OF B.C., JR.

APPLICATION FOR WRITS OF CERTIORARI AND REVIEW TO REVIEW A JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEAL RENDERED IN MATTER NO. CR92-826

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Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No. 92-1862

In The

Supreme Court of the United States

October Term, 1993

B. C., JR.,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Court Of Appeal
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state juvenile court impose upon a disabled student who has been adjudicated as a child in need of supervision a condition of probation that he receive homebound instruction notwithstanding the federal Individuals with Disabilities Education Act (IDEA)?

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No. 92-1862

In The

Supreme Court of the United States

October Term, 1993

B. C., JR.,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Court Of Appeal
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On September 18, 1991, the District Attorney for the Parish of Grant, State of Louisiana, filed a petition with the Thirty-Fifth Judicial District juvenile court requesting that petitioner, B.C., Jr., date of birth 10-20-78, be declared a child in need of supervision under Louisiana Code of Juvenile Procedure article (La.C.J.P. art.) 25 *et seq.* (now repealed) [current version at Louisiana Children's Code article (La.Ch.C. art.) 792 *et seq.* (effective January 1, 1992)]. (R. 1-3, 134). The State of Louisiana alleged that petitioner, who is classified as a disabled student entitled

to special education services under the federal Individuals with Disabilities Education Act (IDEA) (formerly The Education of the Handicapped Act, "EHA"), 20 U.S.C. § 1400 *et seq.* while enrolled in a Grant Parish public school, engaged in continuous, long-term disruptions at school, including fighting and committing batteries on classmates. (R. 1, 8-17, 18-23, 24, 25-31). A female classmate complained that petitioner intentionally pushed her on many occasions, one time injuring her by running her over and pushing her into a pole. (R. 9, 12, 25-31). Petitioner was further accused of threatening to beat up another student if that student did not relinquish his lunch money. (R. 9, 12, 17, 18-23). Upon refusal to relinquish his money, that student was choked by petitioner, and a teacher had to physically restrain the petitioner. (R. 9, 10, 12, 14, 17, 18-23). Subsequent to that incident, petitioner was accused of coercing a third student into using a pencil to stab the student who had refused to relinquish his lunch money. (R. 15, 17, 18-23). That student was stabbed in the stomach with a sharpened pencil; the point of the pencil went through the student's shirt and broke off into his skin. (R. 15, 18-23). The petitioner threatened to beat up the third student if that student did not do as instructed. (R. 13, 17, 18-23).

At a hearing to answer the petition on September 25, 1991, petitioner was appointed counsel. (R. 39, 134). An adjudication hearing was subsequently conducted on October 2, 1991. (R. 134). At that hearing, numerous letters from teachers were entered into the record which supported a finding that, for some time, petitioner had displayed a lack of respect for authority and had exhibited abusive behavior toward others. (R. 9-16). Pursuant

to a plea bargain agreement and with the advice of counsel, petitioner admitted guilt as to the District Attorney's petition. (R. 39, 134). In exchange for the guilty plea, the District Attorney declined to file a petition requesting the adjudication of the petitioner as a delinquent for the charges of extortion and simple battery. (R. 8, 17, 24, 39; R. App. 3). The juvenile court ruled that petitioner was a child in need of supervision and thereby ordered a predispositional investigation and psychological evaluation, returnable to the court by October 30, 1991. (R. 34, 38, 124, 134).

On October 11, 1991, a lawyer for The Advocacy Center for the Elderly & Disabled of Shreveport, Louisiana, enrolled as counsel on petitioner's behalf, replacing the petitioner's court-appointed attorney. (R. 32-33). On October 18, 1991, petitioner submitted a Motion to Modify or Rescind Order requiring homebound instruction as a condition of probation and subsequently filed a memorandum in support of that motion. (R. 35, 45-50). In the motion and memorandum, petitioner's counsel alleged that the petitioner's mother and school officials held a team meeting on October 11, 1991, and that they had agreed that petitioner should return to school with a full-time teacher's aide assigned to control his behavior. (R. 35-36, 47-48, 85-89, 90-92).

On October 18, 1991, the predispositional investigation and psychological evaluation were submitted to the juvenile court. (R. 38-44). The predispositional report recommended supervised probation with the Louisiana Department of Public Safety and Corrections until petitioner reached his 17th birthday, with special conditions of probation including continued participation in the

Child and Adolescent Service System Program at an area mental health clinic and homebound instruction as provided by the Grant Parish School District. (R. 41).

The psychologist's report in response to the juvenile court's order indicated that petitioner had a borderline range of intelligence and that he suffered from "an oppositional defiant disorder" which had progressed into "a conduct disorder, solitary aggressive type." (R. 44). The psychologist recommended a continuation of mental health counseling and noted that "consideration for possible medication will be almost essential if he is to remain in the public school system and stay out of more serious delinquent activity." (R. 44). A previous psychiatric report dated August 28, 1991, indicated that petitioner exhibited "a conduct disorder, aggressive type, solitary" and another psychiatric evaluation on November 29, 1991, revealed that the petitioner exhibited an "oppositional defiant disorder" as well as "mild chronic depression." (R. 105-106).

Pursuant to the petitioner's motion to rescind or modify the juvenile court's order, a hearing was held on November 11, 1991, wherein testimony was presented and counsel agreed to submit the remainder of the matter on briefs. (R. 37, 45-50, 118, 125, 133; R. App. 17-18). Ollie Goudeau, the supervisor of special education for the Grant Parish School District, testified that the school's IEP plan would place the petitioner in a "behavior disordered classroom for 275 minutes a day, five days a week . . . ; [would] provide [petitioner] with a child specific aid (sic). . . . [H]e would be in total isolation on

school campus in a room with this person and not mingling with any other students." (R. App. 9, 10). Subsequent to the hearing, the juvenile court ordered that the petitioner be placed on supervised probation with the Louisiana Department of Public Safety and Corrections until his 17th birthday on October 20, 1995. (R. 124, 129, R. App. 3-19). A condition of probation was that petitioner was to continue "home bound (sic) instructions provided by the Grant Parish School Board." (R. 124, 129-130).

Petitioner's counsel submitted on April 30, 1992, another motion contesting the juvenile court's order. (R. 90-92).

On June 3, 1992, another hearing was conducted after which the juvenile court again ruled petitioner a child in need of supervision and placed him on probation, a special condition of which was that the petitioner be given homebound instruction by the appropriate educational agency pending further orders of the Court. (R. 124, 133).

Petitioner appealed the juvenile court's ruling to the Louisiana Court of Appeal, Third Circuit. (R. 126, 130-131, 133). The Third Circuit in *State In the Interest of B.C., Jr.*, Docket No. CR92-826 (La. Ct. App. 3d Cir. December 9, 1992), upheld the juvenile court's ruling based upon the juvenile's past physical aggression toward classmates and teachers. Further, the appellate court found that the juvenile court's ruling as required by Louisiana law was in the best interest of the petitioner and the public. *See* Petitioner's Brief, Appendix at A-1) (hereinafter Pet.'s Brief, App. at ___). The Louisiana Supreme Court declined to review the Third Circuit's

ruling by a 6-1 vote. *See State In the Interest of B.C., Jr.*, 613 So. 2d 976 (La. 1993). *See also* Pet.'s Brief, App. at A-22.

From the denial of certiorari by the Louisiana Supreme Court, petitioner now files the instant application for writ of certiorari with this Honorable Court. The only issue in the application before this Court is whether the state juvenile court ruling violated the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

SUMMARY OF THE ARGUMENT

In opposing the petitioner's application for writ of certiorari to this Honorable Court, the State of Louisiana argues that there is no valid federal claim upon which a writ should issue. The State of Louisiana contends that IDEA on its face does not purport to limit the authority of a state juvenile court as it pertains to the conditions of probation imposed upon a juvenile who has been adjudicated a child in need of supervision under state law. Further, this Honorable Court in *Honig v. Doe*, 484 U.S. 305 (1988), recognized that the federal statute does nothing to restrain the powers of the judiciary. For these reasons, the State of Louisiana requests that petitioner's application for writ of certiorari be denied.

ARGUMENT

I. A state juvenile court may adjudicate a disabled adolescent as a child in need of supervision and, thereby, as a condition of probation, impose an order of homebound instruction without offending the federal Individuals with Disabilities Education Act (IDEA).

A. A plain reading of IDEA supports a finding that the statute was not designed to limit the authority of a state court.

The State of Louisiana respectfully argues that IDEA imposes no constraints upon a state juvenile court in that Congress passed that statute as a means to regulate state educational agencies and not state courts. *See Honig v. Doe*, 484 U.S. 307 (1988), discussed *infra*. The State recognizes as well that as a condition of receiving federal monies, IDEA requires states to provide children with disabilities a "free appropriate public education," with the statutory term "appropriate" meaning that the child obtains some degree of benefit from the free education. *See* 20 U.S.C. §§ 1400(c) and 1412(1). *See also Teague Independent School District v. Todd L.*, 999 F. 2d 127, 128 (5th Cir. 1993), and *Board of Education v. Rowley*, 458 U.S. 176, 200 (1982). Most importantly, Congress' intent behind this federal law, as this Court recognized in *Rowley* and *Honig* while addressing IDEA's predecessor statute EHA, was "to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt **procedures** which would result in individualized consideration of and instruction for each student." *Rowley*, 458 U.S. at 189 (emphasis in original). *See also Todd L.*, 999 F. 2d at 129, n. 4 (federal statute

"prohibits schools which receive federal funds from discriminating against disabled children"). In fact, this Court in *Honig* noted that, at the time that this federal legislation was passed, eight million disabled children in the U.S. were not receiving appropriate educational services. *Honig*, 484 U.S. at 309. As the Fifth Circuit stated in *Todd L.*, "IDEA was intended to redress a long history of discrimination by public schools against disabled children. Isolation of a schoolchild or reduction of the quality or amount of a child's educational programming solely for the convenience of staff violates IDEA." *Id.*

An examination of IDEA itself supports a finding that Congress never intended that the statute control a state juvenile court which is completely separate and apart from a state educational agency. In fact, 20 U.S.C. § 1415, which provides for mandatory procedural safeguards, speaks in terms of "[a]ny State educational agency" or sub-agency and provides safeguards for any actions by that agency against disabled children and their parents or guardians. The statute stresses the necessity of meaningful parental participation and provides parents with an avenue for appealing adverse decisions they find inappropriate. In particular, once the administrative procedures of IDEA are triggered, the aggrieved party is required by § 1415(e) to bring a civil action in either state or federal court. The statute itself clearly provides that a court reviewing the action of a state educational agency can thereby "**grant such relief as the court determines is appropriate**." (Emphasis added). As *Todd L.*, *supra*, illustrates, a court is empowered to reach an independent finding after *de novo* review. In contrast to what the

petitioner here claims,[1] the State contends that Congress intended to create an enforceable substantive right to a public education for the disabled child and his or her parents, but IDEA's statutory procedures govern only a state educational agency or its subsidiary.

Accordingly, the State of Louisiana would argue that a plain reading of IDEA supports a finding that Congress clearly had no intent to limit the judicial authority of a court, either state or federal, to review a matter that falls directly within the ambit of the statute's administrative procedure. Given that finding, the obvious conclusion is that Congress clearly had no intent to limit the judicial authority of a court acting totally independently of that statute's administrative procedure.

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[1] Petitioner cites *In Re Tony McCann*, 17 E.H.L.R. 551 (Tenn. Ct. App. 1990), as authority for its argument that the state juvenile court in this case exceeded its authority by ordering homebound instruction as a condition of probation for a child receiving special education services pursuant to IDEA. (R. 81-84). The State would counter that the *McCann* decision addressed action by the school officials themselves, and not law enforcement officials acting outside the realm of the educational process. In that case, it was the school officials who failed to follow IDEA's procedural safeguards, by filing a petition in juvenile court seeking to have the child judicially declared as "unruly." *McCann* at 552-553. The Tennessee appellate court held that the school officials had violated IDEA by not following the federal procedures, which included a failure to give the petitioner's mother adequate notice. The *McCann* decision is clearly not applicable to the instant case where the District Attorney, wholly unconnected to the educational system, files a petition seeking to adjudicate a juvenile as a child in need of supervision. Moreover, *McCann* involved a state statute that made IDEA procedures controlling, which is not the case in Louisiana.

B. *Honig v. Doe*, 484 U.S. 305 (1988), recognizes that the federal statute operates separate and apart from the state judicial system.

In *Honig*, this Court held that IDEA's predecessor, EHA, did not limit the equitable powers of a state court from temporarily enjoining a dangerous disabled child from attending schools even though the unilateral exclusion by the school itself for a period greater than 10 days did violate the federal act. This Court further found that the "stay-put" provision of the federal statute, which prohibits school officials from unilaterally changing a child's placement over the parents' objection during the pending administrative and judicial review of the school's placement decision, did not limit or pre-empt a court's authority over determining the proper course of action regarding such a child.[2] *See* 20 U.S.C. § 1415(e)(3). In this case, the action of the juvenile court was clearly

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[2] Louisiana law defines a "child in need of supervision" as inclusive of the following: "a child who needs care or rehabilitation because . . . (a) Being subject to compulsory school attendance, he is habitually truant from school or willfully violates the rules of the school. (b) He habitually disobeys the reasonable and lawful demands of his parents, and is ungovernable and beyond their control. . . . (e) His occupation, conduct, environment, or associations are injurious to his welfare." *See* La.C.J.P. art. 13(a), (b) and (e) (now repealed) [current version at La.Ch.C. art. 791.1(1), (2) and (5) (effective January 1, 1992)]. Further, under Louisiana law, a state court exercising juvenile jurisdiction "shall have exclusive original jurisdiction over a proceeding in which a child is alleged to be in need of supervision." *See* La.C.J.P. arts. 15 and 16 (now repealed) [current version at La.Ch.C. art. 791.2 (effective January 1, 1992)].

authorized by Louisiana law[3] and is not prohibited by IDEA. In light of *Honig*, the State of Louisiana argues that the authority of a juvenile court remains unchanged and unfettered under IDEA.

At issue in *Honig* was whether the statutory "stay-put" proscription directed at school officials extended to disabled children who, due to their disabilities, exhibited dangerous and disruptive behavior in the classroom. In addition, this Court addressed the issue of whether a district court, acting under its equitable powers, could directly order continued educational services for a disabled child who was considered dangerous and disruptive, when the local school agency had unilaterally expelled that child during the pendency of administrative and judicial review.

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[3] La.C.J.P. arts. 25 through 94 (now repealed) provided the judicial process governing the adjudication of a child in need of supervision at the time the juvenile court petition in this case was filed. [Current version at La.Ch.C. arts. 792 *et seq.* (effective January 1, 1992)]. The State is required to prove the allegations in the petition requesting that the child be adjudicated a child in need of supervision by a preponderance of the evidence. *See* La.C.J.P. art. 73 (now repealed) [current version at La.Ch.C. art. 792.43 (effective January 1, 1992)]. Once a court adjudicates a child as a child in need of supervision, the court then is required to order a predispositional investigation and report, and hold a disposition hearing. *See* La.C.J.P. arts. 76, 78-81, and La. R.S. 13:1583 (now repealed) [current version at La.Ch.C. arts. 792.46, 792.48-51 (effective January 1, 1992)]. Under Louisiana law, a court in rendering its disposition order may " . . . [p]lace the child on probation on such terms and conditions as deemed in the best interest of the child and the public . . . " *See* La.C.J.P. arts. 84, 86 and La.R.S. 13:1583 (now repealed) [current version at La.Ch.C. arts. 792.53 and 792.54 (effective January 1, 1992)].

In *Honig*, this Court found that the stay-put provision was "unequivocal" as it plainly required that a state educational agency could not change, without the parents' consent, a disabled child's placement during the pendency of administrative review even though the child was admittedly dangerous. This Court flatly declined to write a "dangerousness exception" into the federal statute. This Court stated that "we can only conclude that the omission [of a dangerousness exception to the stay-put provision] was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create." *Honig*, 484 U.S. at 323 and 325.[4]

By the same token, petitioner in this application for certiorari is attempting to persuade this Honorable Court to rewrite IDEA so as to remove the authority of a state court which operates totally independently of the state educational system. The State urges this Court, as it did in *Honig*, to once again decline that invitation. This Court in *Honig* recognized the independence of the judicial system from IDEA's procedural safeguards by advising school officials that in cases where a disabled child was

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[4] The 5-2 majority opinion in *Honig* clearly drew a distinction between the authority of school officials as opposed to the authority of the judicial system. Justice Brennan, author of the opinion, wrote: "We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; . . . [it] directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts." *Id.* at 323-324.

dangerous, those officials could impose the maximum 10-day suspension as authorized by IDEA and "the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief." *Id.* at 326. This Court stated that school officials would not have to exhaust administrative remedies prior to seeking judicial review under exigent circumstances. This Court also wrote:

> [The federal statute does not] limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's [now IDEA's] legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore, was 'to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings.' The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2) . . . ; indeed, it says nothing whatever about judicial power.

Id. at 327 (emphasis in original; citations omitted).

The State's primary argument that IDEA places no constraint upon judicial power is based both upon the unequivocal language of IDEA and its predecessor, EHA, and upon this Court's interpretation of that federal statute in *Honig*. The State adamantly argues that if Congress did not attempt to limit judicial power as it relates

directly to the statute's administrative review process as this Court clearly found in *Honig*, then the petitioner's argument that IDEA regulates judicial power independent of that review process is patently wrong.

II. In ruling that homebound instruction was in the best interest of the petitioner and the public, the juvenile court afforded the petitioner all the due process protections incorporated in IDEA.

A. Petitioner's argument that the juvenile court failed to follow the official individualized education program (IEP) recommendations is of no merit.

The United States Court of Appeals, Fifth Circuit, in *Todd L., supra*, ruled that, although a district court is required to pay deference to recommendations of an educational agency by giving that decision "due weight," those findings are not conclusive and the district court is free to take additional evidence and reach an independent conclusion supported by a preponderance of the evidence. *Id.* at 131. In the instant case, petitioner claims that the school agency's IEP recommended that petitioner remain in his present school and that the juvenile court's order for homebound instruction is directly contrary to this recommendation. First, the State would counter that the record supports a finding that homebound instruction is compatible with the IEP recommendations.[5] Second,

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[5] Petitioner's motion to rescind or modify the juvenile court's order for homebound instruction contends that the petitioner's parent and school officials agreed that the petitioner

the State would argue that contrary to petitioner's argument that the juvenile court was bound to follow the IEP recommendations, the Fifth Circuit in *Todd L.* found that IDEA did not restrict a court's authority to independently review the local school's IEP and, thereby, find that an alternative placement was the appropriate placement. In fact, IDEA provides that a court reviewing an agency's decision "shall receive the records of the administrative proceedings, shall hear additional evidence, **shall grant such relief as the court determines is appropriate**." 20 U.S.C. § 1415(e)(2) (emphasis added). The Fifth Circuit found that IDEA "does not state that the district court must defer to those findings when its own review of the evidence indicates that the hearing officer erroneously assessed the facts or erroneously applied the law to the facts." *Todd L.*, 999 F. 2d at 131.

This Court in *Rowley, supra,* noted:

> Congress expressly rejected provisions that would have . . . severely restricted the role of reviewing courts. . . . [T]he [Congressional] Conference Committee explained that courts were to

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should remain in school with a "full-time aide assigned to control his behavior and a restricted classroom setting." (R. 35). The IEP dated October 11, 1991, indicates the following: "IEP cannot be put into place; pending further orders of juvenile court"; that petitioner "is difficult to impossible to manage [in] a regular classroom environment"; that he "unfortunately, due to his nearly nonexistent social skills, he is unable to function well or excell (sic) in a school setting"; that petitioner's "current behavior [is] totally inappropriate and not conducive to learning. His abusive actions impairs (sic) the learning of other students in the classroom." (R. 85, 86, 87, 89).

> make 'independent decision[s] based on a preponderance of the evidence.'

458 U.S. at 205, *quoting* S.Cong.Rec. 37416 (1975) (remarks of Sen. Williams).

The Fifth Circuit has further noted that a district court should independently review the appropriateness of an IEP *de novo* and that such review provides procedural due process protection for the rights of disabled children. *See Christopher M. v. Corpus Christi Independent School District*, 933 F. 2d 1285, 1289 (5th Cir. 1991) and *Daniel R.R. v. State Board of Education*, 874 F. 2d 1036, 1040 (5th Cir. 1989). The Fifth Circuit also found that the district court's findings will be reviewed *de novo* by the higher court as a mixed question of law and fact and that the district court's factual findings will be reviewed for "clear error." *Todd L.*, 999 F. 2d at 131.

In this case, under the reasoning of *Todd L.*, a juvenile court acting outside the administrative review process outlined by IDEA clearly has authority to determine what is in "the best interest of the child and the public" as required by Louisiana law. *See* La.C.J.P. arts. 84, 86 and La.R.S. 13:1583 (now repealed) [current version at La.Ch.C. arts. 792.53 and 792.54 (effective January 1, 1992)]. Unless the juvenile court's ruling is "clearly erroneous" and not supported by a preponderance of the evidence, petitioner is entitled to no relief. *See Sherri A.D. v. Kirby*, 975 F. 2d 193, 207 (5th Cir. 1992). For these reasons, petitioner's claim that the juvenile court violated IDEA by not following the IEP recommendation has no merit.

B. The juvenile court afforded petitioner a panoply of due process protections.

IDEA's procedural safeguards, as outlined by 20 U.S.C. § 1415, include the parents' right to examine all relevant documents regarding the decision-making process behind their child's educational placement; the right to prior written notice for any contemplated change or a refusal to initiate a proposed change in the educational placement; an opportunity to present complaints; and "an impartial due process hearing" in response to those complaints. *See* 20 U.S.C. § 1415(b)(1) and (2). Encompassed within these protections is the right to counsel. *See* 20 U.S.C. § 1415(d)(1). Moreover, IDEA provides the aggrieved party with the right to present evidence, confront and cross-examine witnesses, and subpoena witnesses. Finally, that party is entitled to a hearing transcript and written findings of fact and decisions. *See* 20 U.S.C. § 1415(d)(2), (3) and (4). At the conclusion of the administrative hearing process, either parents or the agency may file a civil action in any state or federal court under §§ 1415(c) and (e)(2). As noted above, the court is empowered to consider additional evidence, review the previous findings, and make a finding it considers appropriate. *See* § 1415(e)(2).

The procedural protections as outlined above are the exact procedural protections that were afforded to the petitioner in this case. Therefore, there can be no claim that the petitioner was unconstitutionally denied his right to due process under the law.

CONCLUSION

Based upon the foregoing reasons, the State of Louisiana would respectfully request that this Honorable Court deny the petitioner's application for writ of certiorari to review the judgment of the Louisiana Court of Appeal, Third Circuit.

Respectfully submitted,

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